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MEMORANDUM OF LAW

DATE: April 5, 2001

TO: Honorable Mayor and Members of the City Council

FROM: Theresa C. McAteer, Deputy City Attorney

SUBJECT: Proposed Policy Pertaining to Contacts with Media on City Matters

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INTRODUCTION

In situations where there is a question about the legal liability or responsibility of the City, its officials or employees, for injury to others or violations of law, comments made by City officials or employees to the public (including the media) may unfairly compromise the ability of the City or its officials and employees to defend themselves against such claims. While the City desires to ensure that the public is informed of the actions of the City and its public servants, the City also has legitimate interests in protecting its own rights, and those of its officials and employees, in such cases. This office has been asked to advise the City with respect to what policies, if any, may be implemented to minimize the instances where comments by a City official or employee prejudice the rights of the City or its officers and employees.

QUESTION PRESENTED

What policies may validly be implemented to govern the manner in which City employees comment to the public or media on matters involving the potential responsibility or liability of the City, its officers or employees?

SHORT ANSWER

A policy that balances the First Amendment rights of the City officials and employees against the City's legitimate interests in protecting the integrity of its operations may be adopted and implemented.

DISCUSSION

A. General Legal Principles

A public employee is entitled to First Amendment protections which include the right, within limits, to criticize and comment upon matters touching the public service in which the employee is engaged. *Unruh v. City Council of the City of Selma*, 78 Cal. App. 3d 18, 23 (1978). The First Amendment right to speak freely may be limited, however, by reasonable restrictions that protect the legitimate interests of the public employer in securing the proper administration of the City, or its departments, or that promote or protect the public interest in other respects. Such a restriction will likely be upheld if the public employer demonstrates that: (1) the governmental restraint rationally relates to the enhancement of the public service; (2) the benefits that the public gains by the restraint outweigh the resulting impairment of the constitutional right; and (3) no alternatives less subversive to the constitutional right are available. *Norton v. City of Santa Ana*, 15 Cal. App. 3d 419, 426 (1971), *citing Bagley v. Washington Township Hospital District*, 65 Cal. 2d 499, 501-502, 505 (1966).

The right of free speech and the privilege of public employment are thus not mutually exclusive, and a public employee may speak freely, as long as he does not impair the administration of the public service in which he is engaged. *Belshaw v. City of Berkeley*, 246 Cal. App. 2d 493, 496-497 (1966). "While it is permissible for public employers to impose reasonable restraints on certain officers and employees as a condition of service or employment, and in many situations the public employer can justify the imposition of greater restrictions on high level or policymaking officers and employees than it can on the rank and file [citations], the determination of reasonableness in each instance is dependent upon the facts and circumstances attendant to the particular office or job, the content of the speech and the context in which it was made." *Young v. County of Marin*, 195 Cal. App. 3d 863, 868-869 (1987).

In formulating such restrictions, additional consideration must be given to the need to protect the employees' ability to make legitimate complaints of misfeasance, malfeasance, or irregularities in conduct in office. *Unruh*, 78 Cal. App. 3d at 29, n.6. The City already has a Council Policy, 000-15, which establishes a procedure for ensuring that such complaints are thoroughly and fairly investigated and resolved. Any Council Policy established to restrict public

commentary by City officials and employees must be read together with this important existing Policy.

To determine the necessity for, and permissible scope of, such restrictions, the City must identify the interests that would be served by the restrictions, and then devise reasonable restrictions that will accomplish the City's legitimate purposes with the least possible infringement on the employees' legitimate First Amendment right of free speech. If the City engages in this exercise, the restrictions that result will likely be found to be legitimate if challenged in court. As the United States Supreme Court has said:

> Government employees' First Amendment rights depend on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" . . . . We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."

Board of County Commissioners v. Umbehr, 518 U.S. 668, 676 (1996), citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

B. Interests Warranting Protection

The City has an important interest in protecting the public fisc. To this end, the City vigorously defends itself against claims of civil liability that may result in monetary judgments against the City – judgments that are paid with taxpayer dollars. Defending such claims can be made more difficult when the City is faced with public statements, made by a City employee acting in his official capacity, that might be characterized as "authorized admissions" against the City. Evidence Code § 1222. Once evidence of such official's or employee's "agency" has been received by the court, the declarations or admissions of the agent are admissible against the employer. *Shields v. Oxnard Harbor Dist.*, 46 Cal. App. 2d 477, 488 (1941). The status of an employee as a high-ranking official is probably sufficient to establish that the employee is authorized to speak on behalf of company. *Cruey v. Gannett Company, Inc.*, 64 Cal. App. 4th 356, 366 (1998). Thus, statements of opinion made by a City employee charged with giving such opinions to the public may be received in court as an admission of the City. *People ex rel. Department of Public Works v. City of Los Angeles*, 273 Cal. App. 2d 46, 55 (1969).

The City also has an interest in protecting its employees against unauthorized or improper disclosures about the disciplinary consequences that may result from the employee's conduct. Often, claims against the City are predicated upon the actions of a specific employee who may be subject to discipline arising from his actions. If a supervisor or other ranking City official publicly comments upon the disciplinary consequences of the employee's actions, such comments might be found to have invaded the employee's privacy rights. Whether the City could be legally liable to the employee for such an act would depend upon the individual circumstances of the case, but in any event the disclosure could harm employer-employee relations.

The City Council could find that there are legitimate public interests — in both the exposure of public funds to monetary claims, and the preservation of harmonious employee relations and individual employee rights — that may be served by reasonable restrictions on how and when City officials and employees publicly comment on matters involving the potential responsibility or liability of the City, its officials, or employees.

C. Options

The City Council could adopt a Council Policy expressing the City's desire to protect its interests against damaging comments by individual City officials or employees, as long as it meets the aforementioned criteria. Focusing on the above-identified interests, the policy should limit its application to: (1) comments about incidents where the City or its employees may be found responsible for injury to another person, or violation of a law or regulation; and (2) comments about discipline which may be, or which has been, imposed upon an individual City employee.

Any such policy must clearly define the scope of the comment, or opportunity for comment, covered by the policy. Comments made to the press are a straightforward example; however, the policy – in order to be sufficiently narrow to pass muster – should limit itself to comments that would directly or indirectly ascribe liability or responsibility to the City or any of its employees in connection with the incident. In other words, not every statement to the press would be covered by the policy; statements of condolence for victims of a tragedy not directly involving the City or its employees, for example, or statements announcing a change in City procedures, would not be covered. Clarity is important to enforceability, because if the employee cannot determine from the policy itself what is covered, the policy will not be enforced by the courts (and any discipline imposed for violation of the policy will not likely be upheld). If the exact application of the policy cannot be clearly stated, then a procedure should be implemented to enable an employee to obtain clarification before he makes the public statement. *See Bailey v. City of National City*, 226 Cal. App. 3d 1319, 1330, n.6 (1991) (whether a rule gives "fair

warning" depends not only on the wording of the rule itself but also upon the existence of procedures designed to clarify the rule).

The policy should also be limited in application to those City officials or employees who are either: (1) expressly authorized to comment to the public about a matter within the scope of their employment, or (2) in a position of sufficient authority within the City, so that their comments could be held to be "authorized admissions." And of course, the policy should expressly exclude itself from applying to situations where the official or employee is duly reporting to agencies or officials investigating an incident, as well as comments made to the employee's governmental representatives.

Such a policy could require that, prior to directly or indirectly making such public comment, a department director, deputy director or other high-ranking City official must first advise his or her immediate superior of the intent to make such comment, and obtain that person's approval for any such comments. In the case of an administrative department head, the "superior" could be the Deputy City Manager responsible for that department; in the case of a Deputy City Manager, the clearing authority could be the Assistant City Manager. If the official preparing to make the public comment is the Assistant City Manager, the appropriate supervisor would be the City Manager.

A policy such as the one suggested in this Memorandum would likely be found to be the least restrictive alternative means for securing the City's interests. City employees should be held accountable for the comments they make to the public, in circumstances where such comments may unduly harm the City or its employees. By imposing restrictions that require City officials and employees to ensure their comments are consistent with the City's legitimate interests, *before* those comments are made, the City is actually protecting not only its interests but those of the commenting employee as well. An alternative that only addressed the problem after it occurred would give the employee no opportunity to avoid creating the problem in the first instance, and would not shield the City from the adverse consequences of the comments that were made. An alternative that absolutely prohibited the commentary would have to be very narrowly drawn to ensure it did not unduly infringe on the official or employee's First Amendment rights.

The proposed restrictions would not prevent the employee from speaking, but would allow the City and the employee to determine whether the proposed comments should be made, whether they should be revised to balance the parties' interests, or whether they may be made as proposed, without adverse consequence. A case-by-case application of the restrictions, involving careful consideration and actual discussion between the employee and the supervisor who must authorize the comments, would also provide the kind of individual analysis the courts have found justify the restrictions.

D. Authority for Policy

The City Manager is the chief administrative officer of the City. Charter § 27. Except as otherwise provided in the Charter, he supervises all department heads, and is ultimately responsible to report to the City Council on a wide range of matters related to the City's condition. Charter § 28. It would thus be appropriate for the City Council to vest in the City Manager the ultimate authority to implement a policy restricting the time, place, and manner in which those City officials and employees subject to the City Manager's authority make public statements that could impose (or contribute to the imposition of) liability on the City.

Independent departments, such as the City Clerk's Office, City Auditor and Controller, and Personnel Director, are not within the administrative control of the City Manager. For those departments, the appointed head should implement the Council Policy. In a similar vein, the City's elected officials would be the ultimate implementation authority for their respective staffs.

CONCLUSION

The City must have the ability to defend itself in a court of law, against claims seeking to impose liability against the City and obtain monetary judgments payable from public funds. However, City employees authorized to speak to the press and the public about the City may, in the course of commenting upon certain incidents, hamper the City's ability to defend itself by making statements that could later be characterized as "admissions" in court. The City has a legitimate interest in minimizing the chances that such admissions will be made. The City further has an interest in ensuring that its individual employees are protected against unauthorized or unlawful public commentary about disciplinary matters affecting them.

A policy imposing reasonable restrictions on public commentary in such circumstances should be upheld by a court, if it is narrowly drawn enough to balance the City's interests against the employees' First Amendment rights, and clear enough to be complied with. The policy should articulate the circumstances in which it applies, the persons or officials to whom it applies, the reporting responsibilities of those persons, and the types of comments to which it applies. The Policy should also provide a procedure for implementation and clarification, and

explicitly confirm it is not intended to prevent employees from making legitimate complaints about the City or its practices to the employees' supervisors, governmental agencies, or legislative or other authorized representatives.

CASEY GWINN, City Attorney

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By
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TCM:lb
cc: City Manager
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